

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

BILL AND KATHY WILBERT and DAN  
AND KATIE WILBERT,

Petitioners,

v.

KING COUNTY and PETER FEWING,

Respondents.

SHB NO. 06-025

ORDER ON SUMMARY JUDGMENT

This matter comes before the Shorelines Hearings Board (Board) on a Motion for Summary Judgment<sup>1</sup> filed by the Respondent Peter Fewing. Respondent Fewing is asking the Board to dismiss Bill and Kathy Wilbert and Katie Wilbert (Wilberts) appeal challenging King County's approval of a Shoreline Substantial Development Permit (SDP). King County, also a respondent in this matter, did not participate in the summary judgment motion.

The Board was comprised of William H. Lynch (Chair), Kathleen D. Mix, Andrea McNamara Doyle, Mary Alyce Burleigh, Judy Wilson, and Kevin Ranker. Administrative Appeals Judge Kay M. Brown presided for the Board. Attorney Robert D. Johns represented the Fewings. Attorney William N. Snell represented the Wilberts.

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<sup>1</sup> Respondent Fewing filed two "Motions to Dismiss;" however, if, on a motion for judgment on the pleadings, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(c). *Bame v. Ecology*, SHB No. 05-018 (November 2, 2005)(Order of Dismissal). Here, Respondent Fewing's motions present materials outside of the pleadings, and therefore, the analysis will proceed in a manner similar to a motion for summary judgment.

1 In rendering its decision, the Board considered the following submittals:

- 2 1. Petition for Review with attachments;
- 3 2. Fewing's Motion to Dismiss Claims Not Related to Current Permit;
- 4 3. Fewing's Motion to Dismiss for Untimely Service of Petition;
- 5 4. Declaration of Robert D. Johns with attachment;
- 6 5. Declaration of Mark Mitchell;
- 7 6. Declaration of Patty Fewing;
- 8 7. Petitioners' Response to Motion to Dismiss Claims Not Related to Current Permit;
- 9 8. Declaration of William N. Snell in Response to Motion to Dismiss Claims Not Related to Current Permit with attached Exhibits A through D;
- 10 9. Declaration of Bill Wilbert;
- 11 10. Petitioners' Response to Motion to Dismiss for Untimely Service of Petition;
- 12 11. Declaration of William N. Snell in Reference to Petitioners' Response to Motion to Dismiss for Untimely Service with attached exhibits A through C;
- 13 12. Fewing's Reply Brief in Support of Motion to Dismiss Claims not Related to Current Permit; and
- 14 13. Letter filed September 5, 2006 at the request of the presiding officer from Robert D. Johns.

15 Having fully considered the record in this case and being fully advised, the Board enters  
16 the following ruling.

#### 17 FACTUAL BACKGROUND

18 Respondent Peter Fewing and his wife Patty (the Fewings) own property in the North  
19 Bend area in rural King County. The property consists of 6.08 acres, a portion of which is within  
20 the 100-year floodplain of the South Fork of the Snoqualmie River. *Petition for Review with*  
21 *attachments; Fewing Declaration.*

In March of 2004, the Fewings obtained a grading and clearing permit from King County  
to grade an existing pasture and create a soccer field. At that time, the County concluded the

1 building of a soccer field was a permitted use and therefore, no County land use permit was  
2 required. *Mitchell Declaration, Snell Declaration, Exs. A through D.*

3 The Fewings built a regulation size soccer field on the site. In 2005, they began  
4 conducting day programs for soccer players. For the last two seasons, participants have attended  
5 programs, sometimes lasting more than one day, at the Fewing's field. The participants are  
6 either bussed or driven to and from the soccer day program every morning and evening. *Fewing*  
7 *Declaration.*

8 The Fewings applied for a SDP from King County on December 30, 2004, to further  
9 develop their property as a recreational soccer camp. The Fewings propose to add two new  
10 buildings large enough to house up to 40 children in each building, a caretaker suite with a three  
11 car garage, a four bedroom residence, and a lodge with a meeting room, a dining hall, a kitchen  
12 and two guest rooms. The estimated fair market value of the project is \$4,500,000. They plan to  
13 use the site for a soccer camp 130 days a year. *Petition for Review with attachments, Fewing*  
14 *Declaration.*

15 King County approved the Fewings' SDP application on June 16, 2006, and the County's  
16 decision was transmitted to Ecology on that same date. On July 7, 2006, the Wilberts filed their  
17 Petition for Review of the County's decision with the Shorelines Hearings Board. On July 6,  
18 2006, the Fewings were served by mail with a copy of the Petition for Review at an address in  
19 Seattle taken from the SDP approval issued by King County. The Petition for Review was  
20 returned because the address was no longer current. On July 12, 2006, the Petition for Review  
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1 was mailed a second time to the Fewings at their North Bend address. *Petition for Review with*  
2 *attachments, Johns Declaration with attachment, Snell Declaration with Exs. A through C.*

3 At a pre-hearing conference with the presiding officer, the parties identified nine issues  
4 for the appeal. Respondent Fewing filed two motions for summary judgment. First, he contends  
5 that service on him was not timely. Second, he argues that the Petitioners' claims do not pertain  
6 to the current application, but rather constitute a challenge to the original development of the  
7 soccer facility itself. He contends these challenges cannot be raised now, because the soccer  
8 camp was already established in 2004 with the earlier approvals by the County.

### 9 ANALYSIS

#### 10 A. Summary Judgment Standard

11 Summary judgment is a procedure available to avoid unnecessary trials on formal issues  
12 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the  
13 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party  
14 moving for summary judgment must show there are no genuine issues of material fact and the  
15 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*  
16 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment  
17 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d  
18 451, 456, 824 P. 2d 1207, 1210 (1992).

19 The trier of fact must construe the evidence and consider the material facts and all  
20 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee*  
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1 v. *Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If the moving party is a respondent  
2 and meets this initial showing, then the inquiry shifts to the party with the burden of proof at  
3 trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the  
4 existence of an element essential to that party's case, and on which that party will bear the burden  
5 of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals,*  
6 *Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

7 Here, the Board concludes there are no issues of material fact related to the question of  
8 timeliness of service. Service was timely, and therefore Respondent Fewing's summary  
9 judgment motion is denied on this issue, and summary judgment is granted to the Petitioners.<sup>2</sup>  
10 With regard to Respondent Fewing's second motion, the record is not developed enough to allow  
11 the Board to determine whether some of the issues are outside the scope of this appeal, and  
12 questions of fact remain in relation to the two phases of permitting for this facility. Therefore,  
13 the Board declines to grant summary judgment on any of the issues.

14 B. Timeliness of Service

15 Service requirements for a petition for review to this Board are set out in the Shoreline  
16 Management Act, Ch. 90.58 RCW, and the Shorelines Hearings Board rules, WAC 461-08.  
17 Pursuant to these requirements, a petition for review must be filed at the Board within 21 days of  
18 the date of filing of the shoreline permit with Ecology, and must be served on Ecology, the  
19 attorney general, and the local government within seven days of filing the petition with the

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20 <sup>2</sup> Summary judgment may be granted to the non-moving party when the facts are not in dispute. *Impecoven v.*  
21 *Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

1 Board. RCW 90.58.180(1); WAC 461-08-355. The rule also requires service on the permit  
2 applicant, when the applicant is not the petitioner. WAC 461-08-355(4). Service is complete on  
3 the date of mailing. WAC 461-08-355(5).

4 Here, the Petition for Review was filed with the Board on July 7, 2006, and served by  
5 mail the second time on July 12, 2006. Since even this second date of service was within seven  
6 days of filing,<sup>3</sup> it is not necessary to address the effect of the first mailing to an incorrect address.  
7 Based on this analysis, the Board denies Respondent Fewing's motion to dismiss on lack of  
8 timely service.

9 C. Scope of Issues

10 Respondent Fewing's second argument for dismissal of this petition for review is that the  
11 issues raised by the petition pertain to the existing soccer facility, and not the Respondent  
12 Fewing's new proposal. Since the time period to appeal the initial permit has long since passed,  
13 Respondent Fewing argues the petition should be dismissed.

14 A 4.5 million dollar project to expand and develop an existing soccer facility, at least  
15 partly within the flood plain of the South Fork of the Snoqualmie River, could certainly have  
16 shoreline impacts appropriate for review by the Shorelines Hearings Board. The fact that the  
17 existing soccer field was installed pursuant to a 2004 clearing and grading permit does not shield  
18 the current, significant expansion of the soccer facility from appropriate review. It is possible

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19 <sup>3</sup> The parties seem to assume that the applicant must be served within seven days. The statute does not require  
20 service on the applicant, and the rule requires only that the applicant be served, but does not specify a time period.  
21 See RCW 90.58.180, WAC 461-08-355. See also *Ecology v. Lewis County et.al.*, SHB NO. 00-027 (January 10,  
2001)(Order Denying Motion to Dismiss)(discussing lack of time requirement for service on applicant under WAC  
461-08-355). Here, service was made on the applicant within seven days of filing. Therefore, it is not necessary to  
consider this issue in more depth.

1 that some of Petitioners' contentions are aimed at the existing soccer field and current  
2 operations, and not at the new proposal covered by the SDP. It is also likely that many of the  
3 issues are land use matters more appropriately reviewed by the County than the Shoreline  
4 Hearings Board. However, it is not possible from the material submitted with this motion to  
5 discern which issues are related to the SDP itself and properly before this board in this appeal.  
6 Therefore, the Board declines to dismiss any of the issues on summary judgment.<sup>4</sup>

7 **ORDER**

8 Respondent Fewing's motion to dismiss for untimely service is denied, and summary  
9 judgment is granted to the Petitioners on this issue. Respondent Fewing's second motion to  
10 dismiss claims not related to the current permit is denied, and this issue will proceed to hearing.

11 SO ORDERED this 29th day of September 2006.

12 **SHORELINES HEARINGS BOARD**

13 William H. Lynch, Chair

14 Kathleen D. Mix, Member

15 Andrea McNamara Doyle, Member

16 Judy Wilson, Member

17 Mary Alyce Burleigh, Member

18 Kevin Ranker, Member

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19 <sup>4</sup> Respondent Fewing also argues that Petitioners do not have factual evidence to support their claims. If  
20 Respondent Fewing had put forth a sufficient factual showing with their motion for summary judgment, and had  
21 argued that some of the specific issues were without merit, the burden would then have shifted to the Petitioners to  
come forward with factual evidence to counter Respondent Fewings evidence. *Young v. Key Pharmaceuticals, Inc.*,  
112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989). Here, however, Respondent Fewing did not make such an initial  
showing.

Kay M. Brown  
Administrative Appeals Judge